

UNITED STATES OF AMERICA

v.

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Prosecution Brief  
Discussing Investigations and  
Damage Assessments

26 April 2012

The United States respectfully submits this brief for the Court's consideration.

**SUMMARY**

Investigations can be broken down into two general categories: criminal and administrative. Criminal investigations are concerned with discovering evidence and finding the individual responsible for the crime. Administrative investigations encompass fact finding inquiries. Both criminal and administrative investigations comprise searches for information to aid making factual determinations. Damage assessments, however, as multi-discipline, multi-agency, lengthy inquiries, consider the effects of compromised classified information to reach strategic opinions.

**DISCUSSION**

Criminal investigations seek to discover the perpetrator of the crime and assign liability. An inquiry becomes a criminal investigation when it is conducted with a view toward discovering evidence to be used in the prosecution of a criminal action. *See United States v. Goldfinch*, 41 C.M.R. 500, 507 (A.C.M.R. 1969) (determining that inclusion of CID participation at inception of a health and safety inspection turned the search into a criminal investigation concerned with prosecution). *Williams* also contemplates investigations being oriented towards discovery of the responsible individual. *See United States v. Williams*, 50 M.J. 436, 443 (C.A.A.F. 1999) (stating that the *Brady* line of cases requires the prosecution to review records directly related to the subject of the prosecution absent a specific defense request identifying the entity, type of records, and type of information). Furthermore, *Williams* discusses criminal investigations in terms of proceedings designed to assign criminal liability. *See United States v. Williams*, 47 M.J. 621, 626 (A. Ct. Crim. App. 1997), *aff'd*, 50 M.J. 436 (C.A.A.F. 1999) ("A trial counsel's duty to disclose . . . includes information which the trial counsel has personal knowledge of or is *known to criminal investigators or others that are working on the case being investigated and prosecuted.*") (emphasis added). Ultimately, the fact finder reaches a factual determination based on the evidence gathered in the criminal investigation. *United States v. Augspurger*, 61 M.J. 189, 191 (C.A.A.F. 2005).

Administrative investigations are designed to find facts. *See, e.g., U.S. Dep't of Army Reg. 15-6, Procedures for Investigating Officers and Boards of Officers*, para. 1-5(a) (2 Oct. 2006) ("An administrative fact-finding procedure under this regulation may be designated an

investigation or a board of officers.”) (AR 15-6). Nevertheless, administrative actions are considered separate from criminal investigations<sup>1</sup> because they serve distinct purposes. *United States v. Turner*, 33 M.J. 40, 41 (stating that administrative inspections determine the fitness and readiness of a unit and are therefore unlike searches for evidence as part of the criminal justice process). Similarly, the results stemming from the investigation also distinguish criminal and administrative investigations. *United States v. Bickel*, 30 M.J. 277, 285 (C.M.A. 1990) (differentiating between actions that result in admonitions or adverse administrative actions and those resulting in criminal prosecution). Despite these differences, similar to a judicial proceeding’s verdict, administrative investigations make recommendations based upon the facts of the investigation. See AR 15-6 para. 3-11 (“Each recommendation, even a negative one . . . must be consistent with the findings.”).

Army and Department of Defense (DOD) regulations also discuss investigations in terms of locating relevant facts and persons responsible for compromised or lost classified information. See *U.S. Dep’t of Army Reg. 380-5, Department of the Army Information Security Program*, para. 10-1(a) (29 Sept. 2000) (AR 380-5); *Dep’t of Defense Regulation 5200.1-r, Information Security Program*, 10-100(a) (Jan. 1997) (DOD 5200.1-r); see also *U.S. Dep’t of Army Reg. 381-20, The Army Counterintelligence Program*, para. 4-2 (15 Nov. 1993). AR 380-5 and DOD 5200.1-r investigations are both search oriented—they operate to determine who contributed to losing or compromising classified information and fact finding related thereto. See AR 380-5 para. 10-1(a)(1)–(2) (requiring the investigation to determine whether the classified information was compromised and what persons, situations, and/or conditions contributed to the incident); DOD 5200.1-r 10-100(b)–(c). To meet the regulatory goals of limited scope, investigations under AR 380-5 and DOD 5200.1-r must be conducted promptly to ensure results are reported promptly. See AR 380-5 para. 10-1(a); DOD 5200.1-r 10-100(a). Moreover, investigations under AR 380-5 do not foreclose separate actions relating to the same incident. See AR 380-5 para. 10-1(b).

Damage assessments can relate to the same incident as an investigation; however, damage assessments are distinct from investigations because they are strategic, long-term analyses and not fact finding or criminal endeavors. See, e.g., AR 380-5 para. 10-5(f); but see *United States v. Lonetree*, 35 M.J. 396, 403 (C.M.A. 1992).<sup>2</sup> Damage assessments remain separate and distinct from classification reviews, which are performed in support of a prosecution, and from damage control, which is performed immediately after the discovery or disclosure of the compromise of classified information. See *Dep’t of Defense Instruction 5240.11, Damage Assessments*, Encl. 2 para. E2.1.4 (23 Dec. 1991) (DOD 5240.11).

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<sup>1</sup> Although, administrative investigations are distinct from criminal investigations because they are fact finding rather than judicial proceedings, administrative investigations can transition into criminal ones based on the results of the investigation. *United States v. Cohen*, 63 M.J. 45, 51-52 (C.A.A.F. 2006) (noting that instruction contemplated the possibility that the investigation could transition into a criminal one from an administrative one).

<sup>2</sup> In dicta, *Lonetree* refers to a damage assessment as a “damage-assessment investigation.” *Lonetree*, 35 M.J. at 403. However, the *Lonetree* held the damage assessment was not a criminal investigation for purposes of determining whether the accused was entitled to an Article 31(b) warning because it was not coordinated with the military criminal investigation. *Id.* at 404. Also, the court uses the term “damage assessment” to refer to a series of interviews with a single person, the accused, and this usage is inconsistent with the manner in which the term is used in the case against the accused and in the cited laws and regulations.

Additionally, regulations treat damage assessments separately from investigations because the two are considered separately in different sections of Army and DOD regulations. *Compare* AR 380-5 para. 10-1 *with* AR 380-5 para. 10-5; and *compare* DOD 5200.1-r 10-100 *with* DOD 5200.1-r 10-104 (directing the reader to complete a damage assessment in accordance with DOD 5240.11).

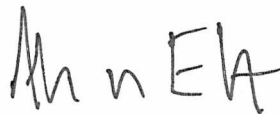
Specifically, damage assessments are “a long-term, multi-disciplinary analysis of adverse effects of the compromise on systems, plans, operations, and/or intelligence.” AR 380-5 para. 10-5(f). Accordingly, the Counterintelligence Enhancement Act of 2002 (CI Enhancement Act) labels damage assessments “strategic analyses” and not “investigations.”

Counterintelligence Enhancement Act of 2002, 50 U.S.C. § 402c(d)(4). The CI Enhancement Act additionally authorizes the Office of the National Counterintelligence Executive (NCIX) to conduct damage assessments but prohibits it from carrying out investigations. *See id.* at § 402c(d)(4), (6) (prohibiting NCIX from conducting counterintelligence investigations or operations). Unlike the rapid response of damage control, damage assessments are typically conducted post-prosecution. *Id.* (stating the that damage assessments should be conducted after a prosecution unless special circumstances necessitate a pre-prosecution assessment).

Conducting damage assessments post-prosecution comports with the time requirements required to determine in great detail the practical effects of a compromise on operations, systems, materials, and intelligence. *See id.* Upon completion, the analyses of intelligence systems in a damage assessment are delivered to security decision-makers. *See Office of the National Counterintelligence Executive, The National Counterintelligence Strategy of the United States* at 10 (Mar. 2005). Ultimately, the opinions presented in the damage assessments shape future intelligence policy at a national level. *See id.*

## CONCLUSION

Based on the above, the United States submits that the term “investigation” does not include damage assessments. Whereas investigations pursue facts and conclusions based thereon, damage assessments look at the strategic effects of lost or stolen classified information. Damage assessments are conducted without an eye toward prosecution, unlike criminal prosecutions, or without a strict fact finding purpose, unlike administrative investigations. Employing multiple disciplines and multiple agencies, damage assessments expansively analyze more than facts—they analyze systems, operations and plans. Significantly, the theories damage assessments dictate policy. Contrastingly, investigations simply determine details to reach factual conclusions.



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